130

(4)

FILED
JUN 1 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-792

In The
Supreme Court of the United States

NATHANIEL GRAY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

WILLIAM T. WHITAKER
Counsel of Record
ANDREA WHITAKER
WILLIAM T. WHITAKER CO., L.P.A.
190 N. UNION STREET, SUITE 301
AKRON, OHIO 44304
(330) 762-0287

Attorneys for Petitioner

June 1, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Whether an application and order for a Title III wiretap that completely fails to notify the issuing judge that the application had been approved by any specially designated Department of Justice official requires a court to comply with the statutorily authorized suppression remedy or whether it can refuse to comply on the basis of vague, extra-record assurances years after the wiretap order was issued and does such a refusal to suppress affect the fulfillment of the reviewing or approval functions required by Congress?

2. Does the Hobbs Act prohibition on "extortion under color of official right," 18 U.S.C. § 1951, permit the prosecution of private persons, under a conspiracy or aider and abettor theory, as extortion perpetrators, acquiescors, or victims, or does it punish none of them and is the conflict in the circuits caused by the expansion of the Hobbs Act to include conduct not covered by the statute?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REPLY BRIEF FOR PETITIONER 1

TABLE OF AUTHORITIES

Chavez v. United States,
416 U.S. 562 (1974) 8, 10

United States v. Acon,
513 F. 2d 513 (3rd Cir. 1975) 7, 8

United States v. Callum,
410 F.3d 571 (9th Cir. 2005) 6, 9

United States v. Fudge,
325 F. 3d 910 (7th Cir. 2003) 7

United States v. Giordano,
416 U.S. 505 (1974) 5, 10

United States v. Lawson,
545 F. 2d 557 (7th Cir. 1975) 7

United States v. McCormick,
500 U.S. 257 (1991) 11

United States v. Radcliff,
331 F. 3d 1153 (10th Cir.) 6

United States v. Staffeldt,
451 F.3d 578 (9th Cir. 2006) ..... *passim*

United States v. Swann,
526 F. 2d 147 (9th Cir. 1975) 8, 9

Constitution, Statutes and Rules:

18 U.S.C. §2518 (10)(a)(i) 10
18 U.S.C. §2518 (10)(a)(ii) 6, 10

REPLY BRIEF FOR PETITIONER

1. The Sixth Circuit's decision in the present case is in direct conflict with the Ninth Circuit's decision in the correctly decided United States v. Staffeldt, 451 F.3d 578 (9th Cir. 2006). The suggestion by the Government that there is no conflict fails to address the resolution of the single issue in both cases and the identical facts supporting the disparate rulings by each Circuit. In addition, the Government fails to address the broader conflict and confusion between the circuits as to what errors in the presentation of an application and the issuance of a Title III order are considered a "minor technicality."

Instead of addressing the conflict, the Government, in its Brief in Opposition, chose to argue the merits of the case. The issue presented in this Petition is that the application presented to and order issued by the judge in Stafeldt is virtually identical in its insufficiencies to those at issue in the instant case. The Ninth and Sixth Circuits came to conflicting conclusions about the insufficiencies in both the application and the order. The holding in Stafeldt is consistent with the statute and Supreme Court precedent. The Sixth Circuit's decision conflicts with both the statute and Supreme Court precedent.

In Stafeldt, the Ninth Circuit received an application and order with no indication of the identity of the authorizing individual or whether, in fact, approval had been received at all. The application stated in general terms that a "duly designated Justice Department official had authorized the request for the wiretap sought in the application. To substantiate this assertion, the application then stated that attached

was a copy of a 'Memorandum of Authorization approving this application' as well as a copy of the Attorney General's order of special designation." Staffeldt, 451 F.3d at 581. However, the attached letter from the Department of Justice ("DOJ") was unrelated to the Stafeldt case and referred instead to another matter entirely. Similarly, in the case presently in front of this Court (herein referred to as "Gray"), there was no indication from the application or order (there were no attachments to either) of either the identity of the authorizing official or that the application for a wiretap had been approved by *anyone* at the Department of Justice ("DOJ"), let alone a properly authorized individual.[1]

The Government fails to appreciate that in everyone of the cases it cites as consistent with the Sixth Circuits decision with Gray, save Stafeldt, the issuing judge was presented with notice in the application, either in the body or in an attachment, that the application had been approved by a properly designated Justice Department official. That single fact permitted the issuing judge to perform the mandated function of insuring compliance with this essential component of legislation governing an order permitting the interceptions at issue. The applications

---

[1] It is undisputed in this case that the issuing Judge was provided with no documentation indicating that the application had been approved by anyone at the DOJ. Contrary to the Government's suggestion, the issuing Judge was never provided with any notice that a properly designated official approved the application. The Government relies solely upon an unsworn, casual conversation between the AUSA and the issuing Judge wherein the Judge was told that the "OEO" reviewed the application and that ultimately there was some sort of approval.

and orders in Stafeldt and Gray did not permit the issuing judge to determine compliance with this component, yet, each Court issued a different holding as to whether the statutorily mandated remedy of suppression was required for this failure to comply with the statute.

The Stafeldt Court found that suppression was the only remedy because the facial insufficiency made it impossible for a judge to conclude from the face of the application that the wiretap had been authorized by the appropriate person at the DOJ or, in fact, authorized by any person. Despite the fact that the same is true with regard to the application and order submitted to the issuing Judge in the case *sub judice*, the Sixth Circuit upheld the denial of suppression on the ground that the failure of the application and order to even speak to approval of the application was a minor insufficiency not warranting suppression.

In direct contrast to the Sixth Circuit, the Ninth Circuit in Stafeldt determined that "[b]ecause a wiretap application that has not been authorized by the DOJ cannot support the issuance of a wiretap order, the failure of the application to show that it had been authorized cannot be considered minor." Staffeldt, 451 F.3d at 579. The Court determined that a "wiretap application is facially sufficient if, on the basis of the information that appears on its face, it could reasonably be believed that it meets all the statutory requirements, including the requirement that a duly empowered Justice Department official authorize the application for the particular wiretap being sought, and thus that the wiretap is warranted. If not, the application or order is deemed facially insufficient." Id. at 582. Looking at the Stafeldt

wiretap application, it would be impossible for a judge to "conclude from the face of the application, including the attached memorandum of authorization, that the request for the Staffeldt wiretap had been authorized by the Justice Department", so the order was facially insufficient. Id. at 582. "As a result, a reading of the application would preclude a determination that all the statutory requirements for approving a wiretap of Staffeldt's telephones had been met." Id. at 583. The Court went onto to determine that this was not a minor insufficiency because the approving Judge could not determine from the application, order or attached letter that the application was approved by a properly authorized DOJ official. This holding is diametrically opposed to the holding by the Sixth Circuit at issue in Gray.

The Stafeldt Court recognized that judicial approval was obviously at the core of the congressional purposes underlying this statute. "The statutory scheme created by Congress relies on a uniquely rigorous bifurcated system of authorization involving review and approval by both the executive and judicial branches." Id. at 580.

The insufficiencies at issue here and in Stafeldt are nearly identical. In fact, the application and order in Stafeldt provided more information than those at issue in the case *sub judice*. Neither the application, the order or any attachments to either in Gray made any mention of whether the application had been approved by *any* DOJ official or identified that approval had been obtained, let alone included the identity of the authorizing individual. There was absolutely no information in the application or order here that related to this critical information to a judge's

determination of whether the issuance of the application was warranted. That is, that the wiretap has been authorized by the appropriate person at the DOJ. As in Stafeldt, the application is facially insufficient in that it fails to show that it was authorized at all by any DOJ official. Here, unlike Stafeldt, the application and order provided the issuing Judge with no indication or information whatsoever that any approval had been received from the DOJ. The application does not even contain the general terms that a "duly designated Justice Department official had authorized the request for the wiretap sought in the application." Because the Supreme Court has recognized "that Justice Department authorization is a 'critical pre-condition' to the approval of a wiretap application,...the absence of [authorization] clearly is "likely to affect the judge's determination that a wiretap is or is not warranted.'" Id. at 584 (quoting United States v. Giordano, 416 U.S. 505, 515-516 (1974)). The facial insufficiency at issue in the instant case is indistinguishable from the insufficiency in Staffeldt. The Ninth Circuit's holding that the insufficiencies cannot be considered minor and that suppression was required is in direct conflict with the Sixth Circuit's holding in Gray.

2. The various cases cited by the Government do not establish that this issue has been resolved or that the Sixth Circuit's decision is in line with the majority of circuits. The Government cites to various cases that state that a minor insufficiency does not require suppression. Neither Petitioner nor the Ninth Circuit in Staffeldt disagrees with that general proposition. However, in none of the cases cited (other than Stafeldt) is there a complete failure of the requirement of Title III applications and orders to identify whether

the application had been approved by a properly designated DOJ official or received any approval at all. Further, it is misleading to claim that the issues presented in this Petition have long been resolved in the Government's favor. Both the District Court in Gray and the Ninth Circuit have noted that the Supreme Court has not ruled on the issue presented in this Petition. See United States v. Gray, Case No. 1:04CR580 (Northern District of Ohio), June 6, 2005 Opinion, p. 13, "The Supreme Court has not resolved the issue presented in this Case."; United States v. Callum, 410 F.3d 571, 574 (9th Cir. 2005) ("the Supreme Court has not yet decided a case involving a facially insufficient warrant under section 2518(10)(a)(ii)...")

The Brief in Opposition contains a discussion of United States v. Radcliff, 331 F. 3d 1153 (10th Cir.). In Radcliff, the order authorizing the wiretaps failed to identify the person from the DOJ who authorized the application. However, the application named the correct individual and the order listed by title every Department of Justice official with legal authority to authorize an application. The Court found this to be an insufficient order because the "general language fails to specify the identity of any person at all--anyone holding any title identified in the wiretap order could have been the person who authorized the wiretap applications." Radcliff, 331 F. 3d 1162. Despite this insufficiency, the 10th Circuit held that § 2518(10)(a)(ii) does not require suppression because the Judge could clearly tell from the application that proper authorization had been given by the DOJ. The language of the application and order "did not subvert [Congress'] purpose" and the issuing judge was able to determine the DOJ official's identity. Id. at 1163. *Also*

cited by Government, see United States v. Fudge, 325 F.3d 910 (7th Cir. 2003) (The application for the wiretaps and the wiretap orders failed to identify the authorizing government official but the application asserted that the Attorney General authorized this application and copies of the Attorney General's order of special designation and the memorandum of authorization approving the Application were attached to the application. The application, with attachment, and order indicated that the application was authorized by a duly designated official. The Court noted that attaching the authorization letter "tested the boundaries of complying with statutory provisions." The Seventh Circuit indicated that it was because the order specifically noted that authorization was made pursuant to a power delegated by the Attorney General that the order did not violate any substantive requirement of Title III. Therefore, the clear implication is that an order that fails to name any authorizing official or whether there even was authorization would require suppression and, thus, the holding is in conflict with Gray.); United States v. Lawson, 545 F.2d 557 (7th Cir. 1975) (The authorization was signed by a different person than who approved the application. Both the order and application indicated that it was authorized.)

The Government also cites to three other cases that it claims support the Sixth Circuit here. Those cases again are easily distinguishable from the instant case and Stafeldt and include language that demonstrates that their holdings conflict with the Sixth Circuit. The first of those cases is United States v. Acon, 513 F.2d 513 (3rd Cir. 1975). The wiretap authorization letters were signed by an acting assistant attorney general but actually approved by the Attorney General. Id. at

514. As noted in Stafeldt, the Court in Acon explained "whether a facial insufficiency is minor relates to the 'distinction[s] in the kinds of information which must be supplied to the approving judge. Suppression is merited only when the facially insufficient information is 'likely to affect the judge's determination that a wiretap is or is not warranted.'" Stafeldt, 451 F.3d at 584 (quoting Acon, 513 F.2d at 517). As the facial insufficiency at issue in Gray and Stafeldt precluded the ability to determine who approved the application and *if any* approval was received, the holding by the Sixth Circuit is in conflict with Acon. As held in Stafeldt, this is clearly likely to affect the judge's determination of whether to approve a wiretap. The language in Acon supports Petitioner's claim that there is a profound conflict between the circuits.

The same holds true for United States v. Swann, 526 F.2d 147 (9th Cir. 1975), which relied upon Acon. This is one of many cases where the Attorney General had approved the application but the application indicated that another individual had provided that approval. The Court found, consistent with Chavez v. United States, 416 U.S. 562 (1974), that this was only a minor insufficiency. Id. at 149. In Stafeldt, the Ninth Circuit pointed out that the applications in Swann were insufficient on their face with respect only to the *identity* of the Justice Department official who authorized the applications. Staffeldt, 451 F.3d at 584-585 "[T]he applications did not, on their face, prevent the reviewing judge from determining whether authorization for the particular wiretaps requested had been obtained at all. Swann did not suffer from a facial insufficiency comparable to that of the application [in Stafeldt]. The obtaining of authorization for the particular wiretap is a

significantly more important factor in the judge's determination of whether the wiretap is warranted than the identity of the authorizing official." Id.

The Government also cites United States v. Callum, 410 F.3d 571 (9th Cir. 2005) for the proposition that failing to identify the DOJ source was not a substantial impairment of Congressional purpose. In Callum, neither the application nor the order included the identity of the authorizing individual at the DOJ but Ninth Circuit concluded that suppression was properly denied because the written DOJ authorization letter was part of the application for the wiretap. The letter contained the necessary information to enable the judge to determine that the application was approved. Despite the fact that the letter was part of the application and that the letter contained the necessary information, the Court went onto to say that it was ruling "*[u]nder the force of precedent*" and went on to note that "Title III is an exacting statute obviously meant to be followed punctiliously..." Callum, 410 F.3d at 579. Stafeldt again explains that the facial insufficiencies at issue in Callum are not similar to those in the instant case. When a DOJ memorandum of authorization for a wiretap is with the application, the memo is part of the application. The facial insufficiency at issue in Callum "related to the *identity* of the authorizing official, not to the fact of authorization itself." Stafeldt, 451 F.3d at 584. The Court went onto to note that both Callum and Swann simply hold that "when the facial insufficiency relates exclusively to the identity of the authorizing official, that insufficiency is minor and does not require suppression." Id.

Contrary to the Government's suggestion the case at issue here is also in conflict with, decisions made by this Court. Both Chavez v. United States, 416 U.S. 562 (1974) and United States v. Giordano, 416 U.S. 505 (1974) found the documents at issue there to be facially sufficient so the review was under § 2518(10)(a)(i) not § 2518(10)(a)(ii). Giordano cautions that "[p]aragraphs (ii) and (iii) [of § 2518(10)(a)] must be deemed to provide suppression for failure to observe some statutory requirements that would not render interception unlawful under paragraph (i)." Giordano, 416 U.S. at 527. Further, when discussing § 2518(10)(a)(i), both cases state that suppression is required under § 2518(10)(a)(i) when there is a failure to enable the issuing judge to determine whether those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device have been satisfied. Giordano, 416 U.S. at 527. In both Giordano and Chavez, this Court found it significant that with an incorrect identification, a judge examining the application and order on its face could reasonably believe that a duly empowered DOJ official had in fact authorized the wiretap request." Giordano, 416 at 525 n.14.

The conflict between the circuits on the issue presented here is clear and profound. The circuits differ in the application of § 2518(10)(a)(ii) to the failure to identify in either the application or order whether any proper authorization was obtained from the DOJ.

3. The second issue presented in Mr. Gray's Petition involves the confusion and conflicts among the circuits on the attempt to use the Hobbs Act prohibition on extortion to punish the bribery of state officials. That confusion has predated Justice Scalia's recognition of it in United States v. McCormick, 500 U.S. 257 (1991).

> ...where the United States Code explicitly criminalizes conduct such as that alleged in the present case, it calls the crime bribery, not extortion -- and like all bribery laws I am aware of (but unlike § 1951 and all other extortion laws I am aware of) it punishes not only the person receiving the payment but the person making it.
> Id. 278-280.

Mr. Gray relies upon his presentation in the Petition on that issue.

Respectfully submitted,

William T. Whitaker
Andrea Whitaker
WILLIAM T. WHITAKER CO., L.P.A.
190 N. Union Street, Suite 301
Akron, Ohio 44304
(330) 762-0287
Attorneys for Petitioner Nathaniel Gray